No. 83-2030

IN THE

Supreme Court of the United States

October Term, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, OKLAHOMA,

Appellant,

v.

THE NATIONAL GAY TASK FORCE,

Appellee.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, JOINED BY THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

IN SUPPORT OF AFFIRMANCE

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Interest of *Amici Curiae*

The State of New York, by its Attorney General, Robert Abrams, joined by the State of California, by its Attorney General, John Van de Kamp, submit this brief as *amici curiae* pursuant to Supreme Court Rule 36.4.

As chief legal officers of the States of New York and California, *amici* are charged with protecting the civil rights and liberties of their citizens, including public employees, homosexuals and those seeking to discuss unpop-

ular causes. New York and California aggressively enforce their civil rights laws and policies against discrimination in public employment. They seek to protect government employees from discrimination based on unpopular beliefs and lifestyles* and will continue such efforts.

Statement of the Case

Appellees, The National Gay Task Force, whose members include public school teachers employed by appellant, brought this facial challenge to the constitutional validity of Okla. Stat. tit. 70, § 6-103.15. This statute provides, in relevant part, that a teacher, teacher's aide or student teacher "may be refused employment, or reemployment, dismissed or suspended after a finding" that he or she has "advocat[ed], . . . encourag[ed] or promot[ed] public or private homosexual activity in a manner that creates a substantial risk that such [speech] will come to the attention of school children or school employees" and that he or she "[h]as been rendered unfit for his or her position because of such [speech]." Okla. Stat. tit. 70, § 6-103.15. "Public homosexual activity" is defined as sodomy, committed in public with a person of the same sex. The statute does not define "private homosexual activity."

The statute further provides that several factors shall be considered in making a determination of unfitness: the

* For example, New York Executive Order Number 28 provides that no State agency or department shall discriminate on the basis of sexual orientation in any matter pertaining to employment by the State, or in the provision of any State services or benefits. N.Y. Exec. Order No. 28 (Nov. 18, 1983).

likelihood that the speech "may adversely affect students or school employees"; "the proximity" of the speech "in time or place" to that person's official duties; "extenuating or aggravating circumstances"; and "whether the [speech] is of a repeated or continuing nature which tends to encourage or dispose school children toward similar [speech]." *Id.**

Another Oklahoma statute provides that a teacher may be dismissed or refused reemployment for "immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason allowing moral turpitude, . . . [or] if convicted of a felony . . . ." Okla. Stat. tit. 70, § 6-103. Teachers convicted of heterosexual or homosexual sodomy, or found to have solicited school children for sexual purposes, or otherwise found to have acted immorally or incompetently, or whose extra-curricular advocacy results in willful neglect of their classroom duties, may be immediately suspended and then dismissed, after a hearing, under this latter statutory provision. Section 6-103 remains untouched by the present litigation.

Appellees filed suit in the United States District Court for the Western District of Oklahoma challenging Okla.

* Section 6-103.15 also provides that public school teachers, teacher's aides or student teachers may be dismissed or refused employment upon a finding that they committed sodomy in public with a person of the same sex or upon a finding that they "solicited" or "imposed" "public or private homosexual conduct in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees . . . ." Okla. Stat. tit. 70, § 6-103.15. Appellees originally challenged these provisions on first amendment privacy and equal protection grounds but have not appealed the lower courts' adverse decisions on these issues to this Court.

Stat. tit. 70, § 6-103.15 on its face, alleging that it violated their first amendment rights. The district court upheld the statute in its entirety. *The National Gay Task Force* v. *Board of Education of the City of Oklahoma City,* No. Civ-80-1174-E (W.D. Okla. June 29, 1982). It found the speech portion of the statute constitutional by reading into it a requirement that a teacher be found to have materially and substantially disrupted the school by such speech.

The United States Court of Appeals for the Tenth Circuit reversed the district court to the extent of holding that the statute's restrictions on "advocating . . . encouraging or promoting public or private homosexual activity" constituted an impermissibly overbroad regulation of protected expression. *The National Gay Task Force* v. *Board of Education of the City of Oklahoma City,* 729 F.2d 1270 (10th Cir. 1984). The court concluded that the statute reached more than advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," speech outside the scope of first amendment protection. *Id.* at 1274, *quoting Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1969). Because the statute reached protected speech, the court reasoned, a teacher could not be fired or refused reemployment for making such speech without a showing "that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *The National Gay Task Force,* 729 F.2d at 1274, quoting *Childers* v. *Independent School District No. 1,* 676 F.2d 1338, 1341 (10th Cir. 1982). The statute failed to require such a showing, the court concluded, rendering that portion of section 6-103.15 unconstitutional.

Summary of Argument

States and local school boards must obey the Constitution in exercising their discretion to manage public school affairs. *Board of Education* v. *Pico,* 457 U.S. 853, 864 (1982); *Tinker* v. *Des Moines School District,* 393 U.S. 503, 507 (1969). Oklahoma cannot deprive its teachers of their first amendment rights without proof that the proscribed speech will interfere with classroom duties or proper school functioning. *Givhan* v. *Western Line Consolidated Schools,* 439 U.S. 410, 414-15 (1979); *Pickering* v. *Board of Education,* 391 U.S. 563, 569-570 (1968). Oklahoma ignored this first amendment imperative in enacting Okla. Stat. tit. 70, § 6-103.15.

Okla. Stat. tit. 70, § 6-103.15* restricts a wide variety of speech by teachers, teacher's aides and student teachers solely because of the content of that speech, *i.e.,* because it relates to the subject of homosexuality. By the threat of sanctions, it chills the exercise of fundamental rights to speak about an issue. It curtails teachers' first amendment rights without requiring a showing of interference with proper school functioning. Section 6-103.15 must therefore be struck down as a violation of the first amendment, applied to the states through the fourteenth.

Oklahoma retains sufficient power, without relying on section 6-103.15, to refuse to hire, or to discharge or refuse reemployment, to teachers on the grounds of "immorality, willful neglect of duty, cruelty, incompetency, teaching

* Unless otherwise indicated, a reference to section 6-103.15 or "the statute", refers only to that portion of section 6-103.15 before this Court: encouraging, providing or advocating public or private homosexual activity.

disloyalty to the American Constitutional system of government, or any reason involving moral turpitude, . . . [or] if convicted of a felony . . . ." Okla. Stat. tit. 70, § 6-103. Under this latter statute, Oklahoma may discharge teachers if their speech or conduct on any subject impedes their professional duties or otherwise interferes with the regular operation of the schools. *Pickering* v. *Board of Education*, 391 U.S. at 572-73. There is, therefore, no basis for Oklahoma's assertion that, if the lower court's decision is affirmed, Oklahoma will lose its power to remove teachers whose advocacy of illegal conduct interferes with their school duties.

ARGUMENT

I.

By punishing teachers who speak on the subject of homosexuality, Oklahoma has exceeded its constitutional power to manage its schools and public employees.

It is well settled that states and local school boards must exercise their considerable discretion to manage their schools "in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Education* v. *Pico*, 457 U.S. at 864-65; *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 637-38 (1943). As this Court has previously stated, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960), *citing Wieman* v. *Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

Thus, a teacher cannot be compelled to relinquish the first amendment rights he or she would otherwise enjoy as a citizen unless the exercise of those rights impedes the teacher's proper performance of his or her daily classroom duties or interferes with the regular operation of the schools. *Pickering* v. *Board of Education*, 391 U.S. at 572-73; *see Givhan* v. *Western Line Consolidated School District*, 439 U.S. at 414-15 & n.4; *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 283-84 (1977). Neither can a teacher be refused employment or reemployment on "a basis that infringes his constitutionally protected interests—especially his interests in freedom of speech." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

Oklahoma ignored first amendment imperatives in enacting section 6-103.15. That law threatens teachers with dismissal for any discussion of homosexuality other than one which simply condemns it. Oklahoma thereby exerts a chilling effect upon an entire class of present and future public employees—teachers, student teachers and teacher's aides—from speaking out on an issue. And the sanction imposed, dismissal, is too imprecisely related to professional performance or the operation of the schools to pass constitutional muster under *Pickering*.

Because of the importance of the first amendment right to exchange ideas, this Court has invalidated numerous state statutes and actions which sought to suppress the rights of public employees, including teachers, to participate in public affairs. *See Connick* v. *Myers*, —— U.S. ——, 103 S.Ct. 1684, 1688-89 (1983). Section 6-103.15 must likewise be invalidated for its far-reaching and inhibiting effects on the rights of public employees.

A. The Statute Reaches Rights to Speech and Association Protected by the First Amendment.

The subject of the statutory provisions at issue in this case, speech which "advocat[es] . . . encourag[es] or promot[es] public or private homosexual activity," includes a plethora of speech traditionally protected by the first amendment.* Oklahoma has chosen to ban such speech

* According to *Webster's 3rd New International Dictionary* (1976), the foregoing words have the following meanings and therefore include the following types of speech:

(i) advocate: to plead in favor of; defend by argument before a tribunal or to the public; to support or recommend publicly;

(ii) encourage: to give courage to; to spur on; to hearten; generally "instilling with courage, confidence and purpose or fostering enough of these characteristics by advice, inducement or similar influence to perform or endure"; and

(iii) promote: to advance, put forward, present.

The district court ignored the plain meaning of these words when it claimed that the statute does not reach:

(i) a teacher who "merely advocates equality for or tolerance of homosexuality";

(ii) "a teacher who openly discusses homosexuality";

(iii) "a teacher who assigns for class study . . . books written by advocates of gay rights";

(iv) "a teacher who expresses an opinion . . . on the subject of homosexuality"; or

(v) "a teacher who advocates . . . civil rights for homosexuals."

The National Gay Task Force v. *Board of Education of the City of Oklahoma City*, No. Civ-80-1174-E slip. op. at 20-21 (W.D. Okla. June 29, 1982). Each of the foregoing types of speech could be said to "support or recommend" (advocate) or "give courage to" (encourage) homosexual activity. Teachers could with justification conclude, therefore, that any political, social or educational speech regarding homosexuality might prompt proceedings under this statute.

by teachers, student teachers or teacher's aides if the speech "creates a substantial risk that such conduct will come to the attention of school children or school employees."

The statutory provisions are applicable whether the speech takes place on or off school grounds or property, during or outside of classes, in public or private, or even within or away from the hearing of another school employee or school child.* There need be only a risk that speech regarding homosexuality will come to the attention of school children or school employees. All possible variations of speech are proscribed simply because of the subject matter—public or private homosexual conduct.** That the speech must also render a teacher unfit (the so-called "nexus" provisions considered in Point I. B., *post*) does little to protect the teacher's right to speak, or to lessen the inhibiting effect of the broad statute.

If applied to the citizenry of Oklahoma as a whole, section 6-103.15(A) and (B) would violate the first amendment. This Court has repeatedly invalidated state regulations that attempt to restrict expression because of its content, its ideas, its message or its subject matter. *See*

* "School employees" are not defined in the statute. Presumably, the term applies to fellow teachers, school secretaries, janitors, administrators, cafeteria workers and any other person employed by the Oklahoma public school system, all of whom are adults.

** The statute must be judged as written because it is not within this Court's power to construe and narrow state laws. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972); *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972); *United States* v. *37 Photographs*, 402 U.S. 363, 369 (1971). Contrary to appellant's suggestion, *Gay Activists Alliance* v. *Board of Regents*, 638 P.2d 1116 (Okla. 1981), did not interpret section 6-103.15. It held that the first amendment prohibited the University of Oklahoma from denying recognition to a student association organized to advocate elimination of legal discrimination against homosexuals.

Consolidated Edison Co. v. *Public Service Commission*, 447 U.S. 530, 537 (1980); *Police Department of The City of Chicago* v. *Mosley*, 408 U.S. 92 (1972).* "To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control." *Id.* at 95-96.**

Oklahoma relies on *Ginsberg* v. *New York*, 390 U.S. 629 (1968), for the proposition that the state may contract the

* That many individuals believe homosexuality is wrong or evil does not mean that the State may proscribe speech about the subject. "[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U.S. 576, 592 (1969); *see e.g.*, *Carey* v. *Population Services International*, 431 U.S. 678, 701 (1977) (striking down prohibition against advertising of contraceptives although such advertising is arguably offensive and embarrassing and legitimizes the sexual activity of young people); *Healy* v. *James*, 408 U.S. 169, 187-88 (1972) (a state college may not restrict speech or association for a local SDS chapter "simply because it finds the views expressed . . . abhorrent").

** Notwithstanding the first amendment's hostility to content-based regulation of speech, Judge Barrett argued in his dissenting opinion in the Tenth Circuit that sodomy is "*malum in se, i.e.*, immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state," the advocacy of which "does not merit any constitutional protection." 729 F.2d at 1276. Judge Barrett's theory of constitutional interpretation was flatly rejected by this Court in *Cohen* v. *California*, 403 U.S. 15 (1971), in dealing with the display of offensive language. "[I]t is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25; *see also People* v. *Onofre*, 51 N.Y.2d 476, 488 n.3, 415 N.E.2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980).

Moreover, Judge Barrett's assertion that sodomy is "*malum in se*" ignores a good deal of contrary law. Twenty-six states have decriminalized consensual sodomy between adults in private, and homosexual conduct has been decriminalized in some European countries for years. *See Baker* v. *Wade*, 553 F. Supp. 1121, 1130 n.17 (N.D. Tex. 1982) (referring to England, France, Holland, Finland).

scope of the first amendment in order to protect children. There, this Court upheld a conviction for selling what would otherwise have been constitutionally protected material to a sixteen year old boy in violation of a state statute, the Court concluding that a state could adjust the definition of obscenity when applied to minors. *Id.* at 638. This case, however, is unlike *Ginsberg* in that it does not deal with obscene speech, which is unprotected by the first amendment. *Id.* at 635; *Roth* v. *United States*, 354 U.S. 476, 485 (1957). Rather, section 6-103.15 proscribes a wide variety of speech traditionally given the highest protection under the first amendment: speech deemed advocacy, promotion or encouragement of the rights of a portion of our citizenry, homosexuals. "Speech . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. . . . [T]he values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213-14 (1975).

Section 6-103.15 also infringes first amendment rights to petition and to associate. Because the statute reaches any statement of support for homosexuals that could come to the attention of school employees or school children, it discourages teachers from joining together to achieve a common goal, such as decriminalization of sodomy. Yet the practice of persons sharing common views and banding together to accomplish a particular goal is deeply embedded in the American political process. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982); *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 294 (1981); *see Healy* v. *James*, 408 U.S. at 181-82; *cf. Roberts* v. *United States Jaycees*, —— U.S. ——, 104 S.Ct. 3244, 3252 (1984)

(discussing the importance of the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends as a corresponding right to engage in other activities protected by the first amendment). Collective efforts on behalf of shared goals are especially important in shielding dissident expression from suppression by the majority and in making possible a distinctive contribution by a minority group to the ideas and beliefs of our society. *See e.g., NAACP* v. *Buttons*, 371 U.S. 415, 431 (1963). For that reason, the right to associate with others is implicit in the freedoms protected by the first amendment. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. at 907-08; *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958).

The Oklahoma statute is even more likely to infringe on the right to associate for political and social goals because it is aimed at speech bearing a "substantial risk" of coming to the attention of school employees or school children. Prohibiting speech that is likely to come to the attention of school employees or children is an overly broad effort to prohibit the views advocated from reaching a wide audience, which it must do if the speech is to accomplish the intended political and social goals. The Constitution does not permit states to require advocates of protected speech to exercise their rights under the threat that if—even for reasons beyond their control, such as media coverage—the speech should reach a proscribed audience, they would be subject to such drastic sanctions as loss of their employment.*

* There is simply no way for a would-be speaker to know in advance who, or how many, in his or her audience will be sufficiently persuaded or disturbed by what is said to repeat it to others. The speaker need not act at his or her peril absent such prescience, a point we turn to in I. B., *post*.

B. The Statute's Nexus Requirements Do Not Satisfy the *Pickering* Balancing Test Because They Fail to Require a Showing That the Speech Interferes With Professional Duties or Proper School Functioning.

Because Oklahoma's proscription against the advocacy, enccuragement or promotion of public or private homosexual activity infringes first amendment rights to speak and associate, Oklahoma and appellant must demonstrate that the proscribed speech impedes the teacher's proper performance of his or her daily duties in the classroom or interferes generally with the regular operation of the schools. *Pickering* v. *Board of Education*, 391 U.S. at 572-73. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568; *see Connick* v. *Myers*, 103 S.Ct. at 1687.

Striking the *Pickering* balance in each context may involve different considerations.

> When a teacher speaks publicly, it is generally the content of his statements that must be assessed to determine whether they . . . impede[] the teacher's proper performance . . . or interfere[] with the regular operation of the schools . . . . Private expression . . . may . . . bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened . . . by the manner, time, and place in which it is delivered.

Givhan v. *Western Line Consolidated School District*, 439 U.S. at 415 n.4.

Section 6-103.15 reaches both public and private speech, on or off school property, during or after school hours, by a teacher or by someone who may want to teach in Oklahoma ten years from now, and heard by anyone who may eventually set in motion a process which brings it to the attention of a school employee, regardless of position, or a school child, regardless of age. Indeed, the school child or school employee need not even reside in Oklahoma for the statute to come into play. This blunderbuss approach ignores this Court's cautioning in *Givhan* that content is relevant only in certain situations and that who the teacher speaks to is as important as when he or she speaks.

Given the profusion of speech reached by the statute, the so-called "nexus" requirements of section 6-103.15 cannot possibly strike the proper balance required by *Pickering* and its progeny. They are so broad that they heighten rather than vitiate the statute's chilling effect on teachers who attempt to obey it for fear of losing their jobs. *See Keyishian* v. *Board of Regents,* 385 U.S. 587, 601 (1967); *Baggett* v. *Bullitt,* 377 U.S. 360, 374 (1964). They therefore fail to save the statute from unconstitutionality.

The first purported "nexus" requirement is the "likelihood" that the speech will "adversely affect students or school employees." Under this requirement, any person who simply disagrees with or feels threatened by a statement made by a teacher, student teacher or teacher's aide regarding, for example, the desirability of reconsidering the state sodomy statute, could claim to have been "adversely affected" by this statement and bring it to the attention of another school employee, thereby setting in motion the disciplinary proceedings of section 6-103.15 and

perhaps causing the former's dismissal. It is not even required that the statement be directed at the person who claims to have been "adversely affected", so long as the statement may come to the person's attention. Of course, the speaker cannot prevent that which he or she advocates from reaching a particular audience—short of not speaking at all. The Court has therefore made clear that the speech may not be prohibited merely because it comes to the attention of unwilling listeners:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen v. *California,* 403 U.S. 15, 21 (1971).

Another supposedly narrowing provision is "[w]hether the [speech] is of a repeated or continuing nature which tends to encourage or dispose school children toward similar [speech] or activity." This provision regulates speech without regard to whether it causes interference with school duties. Indeed, it may fairly be said to reach speech that the children themselves do not even hear. It regulates speech that directly or even indirectly encourages others to exercise their first amendment right to speak. The statute reaches far more constitutionally protected speech than is necessary to accomplish the legitimate goal of preventing teachers from proselytizing their students on the subject of homosexuality. Teachers or applicants who engage in

such speech can, in any event, be disciplined under Okla. Stat. tit. § 6-103, discussed *post*.*

Another "nexus" is "proximity in time or place" of the speech to the teacher's official duties. Again, "proximity" without more is a broad, arbitrary restriction absent a further finding, not required by the statute, that the speech interferes with the teacher's official duties or the operation of the schools. Thus, if a teacher were to finish her classroom duty at 3 p.m. and attend a 3:30 p.m. hearing at the state capitol on the Oklahoma sodomy law, her speech would be in proximity of time to her classroom duties but have no effect on or relationship to those duties. Under subsection 6-103.15(C)(2), however, the content of her speech must nevertheless be considered in determining whether she is "unfit."

Finally, the fourth factor is "extenuating or aggravating circumstances." No plausible narrowing construction can be given to this provision, which offers no guidance at all to the teacher who would speak. Instead, inclusion of this factor aggravates the problems of vagueness and overbreadth of the supposedly limiting criteria.

The various "nexus" requirements, in sum, do nothing at all to narrow the kinds of restricted speech to those which affect the teacher's classroom performance. They fail to insure that prior to dismissing or refusing to hire

* Indeed, Oklahoma's use of the phrases "likelihood of adverse affect" and a tendency to encourage or dispose school children toward similar conduct or activity" sounds very much like the "undifferentiated fear or apprehension of disturbance" that this Court has held insufficient to overcome the right to speak. *Tinker* v. *Des. Moines School District*, 393 U.S. 503, 508 (1969); *see Carey* v. *Population Services International*, 431 U.S. 678, 701 (1977).

a teacher, student teacher or teacher's aide, there will be adequate proof of interference with the teacher's performance or the functioning of the schools. Without such proof, Oklahoma is simply attempting to proscribe all manner of speech related to homosexuality. This amounts to censorship of an idea, and is prohibited by the first amendment. *Board of Education* v. *Pico*, 457 U.S. 853, 871 (1982).

C. The Statute Exerts an Unconstitutional Chilling Effect on the First Amendment Rights of Oklahoma School Teachers and Public Employees.

Because the plain words of section 6-103.15 encompass a broad range of speech, especially speech urging social or political change, teachers may easily believe that any political speech they make regarding the rights of homosexuals will lead to initiation of proceedings under section 6-103.15. Appellant, however, contends that a teacher who lobbies the state legislature for repeal of the criminal sodomy statute is protected under section 6-103.15 because the nexus requirements will prevent that teacher from being found "unfit." Aside from the inadequacy of the nexus requirements, discussed *ante*, this argument ignores the chilling effect the statute exerts on Oklahoma's teachers, student teachers, future teachers and teacher's aides regarding the topic of homosexuality. It is no answer to state that, in the end, a teacher probably would be able to prove that there was no connection between his or her speech and professional duties and abilities. What is unacceptable under the first amendment is that he or she may easily conclude that it would be safer not to make the speech at all than to fight for retention after section 6-103.15 has been invoked.

As with the discredited "subversive" statutes of the past, section 6-103.15 serves as a "highly efficient *in terrorem* mechanism," in part because of uncertainty as to its scope. *Keyishian* v. *Board of Regents*, 385 U.S. at 601. Here, as in the statute struck down in *Keyishian*,

> [i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances . . . proscribed increases that caution in "those who believe the written law means what it says."

Keyishian, 385 U.S. at 601, quoting *Baggett* v. *Bullitt*, 377 U.S. at 374.

This is the very type of chilling effect that the overbreadth doctrine is meant to avoid. *See Erznoznik* v. *City of Jacksonville*, 422 U.S. at 216. As this Court has held in striking down other statutes that swept protected speech within their ambit,

> The threat of sanctions may deter almost as potently as the actual application of sanctions. (citation omitted) Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society . . .—might be the loser. . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

Dombrowski v. *Pfister*, 380 U.S. 479, 486-87 (1965).

Appellant contends that section 6-103.15 is necessary to prevent teachers from encouraging their students to commit homosexual acts. As previously discussed, however, the statute on its face reaches much further. It is not restricted to speech advocating that school children commit illegal acts. Instead, the statute in essence states that those who teach in public schools may not speak of homosexuality at any time, in any place, in any way without fear of sanctions. It thereby deters a broad range of protected speech.

That Oklahoma intends by this statute to squelch all speech by teachers, future Oklahoma teachers and teacher's aides about homosexuality is demonstrated by the *amicus* brief of the State of Oklahoma.* It concedes that Oklahoma's intent was not only to prevent teachers from encouraging school children to commit felonious acts, but to promote political neutrality by teachers on controversial subjects. Brief of the State of Oklahoma, *Amicus Curiae*, at 20.**

Even if a state can validly require its teachers to remain politically neutral in the classroom, prohibiting them from commenting in any substantive fashion outside of school about a particular subject strikes at the very heart of the first amendment. To the Oklahoma Legislature, homosexuality is "ungodly" and therefore to be kept from the ears of school children. To the legislators or school officials of another state, Russians or Jews might seem similarly "ungodly" and discussion of them deemed unfit for students'

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* *See also* Okla. H. Res. No. 1054 (1984), directing that the Oklahoma Attorney General assist appellants in this case, stating that "homosexuality is ungodly, unnatural, and unclean . . . ."

** The Oklahoma Attorney General's interpretation should be considered an authoritative source. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 617-18 (1973).

cars.* As this Court recently reaffirmed, however, the first amendment "was fashioned to assure unfettered interchange of ideas . . . ." *Connick* v. *Myers*, 103 S.Ct. at 1689, quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964). This right protects teachers as well as other citizens. *See Connick* v. *Myers*, 103 S.Ct. at 1688-89; *Pickering* v. *Board of Education*, 391 U.S. at 574.

Appellant and Oklahoma contend that the Oklahoma legislature properly decided that it is necessary to bar from the schools those who speak in any way, even in private, in favor of tolerating homosexuality because they make poor role models for impressionable young children.** Apparently it is the speech itself that creates the problem. Appellant's position states the antithesis of first amendment values, which hold that societal disapproval provides

* Oklahoma also relies on the tenets of certain religious teachings against homosexuality to justify its proscription against teacher advocacy, encouragement or promotion of public or private homosexual acts. *See* Brief of the State of Oklahoma, *Amicus Curiae*, at 21-22 & n.1. While a law does not violate the establishment clause of the first admendment simply because it coincides with a religious belief, *Harris* v. *McCrae*, 448 U.S. 297, 319-20 (1980), such a sectarian purpose is nevertheless indicative that the Oklahoma legislature intended far more than merely silencing the advocacy to school children of commiting homosexual sodomy.

** *Amicus* the National School Boards Association misstated the holding in *Acanfora* v. *Board of Education*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) on page 17 of its brief to this Court. In *Acanfora*, a gay teacher's public statements in the press, radio and television about the problems homosexuals encounter in the community were held to be protected by the first amendment because there was no evidence that his statements disrupted the school or impaired his capacity as teacher. His transfer to an administrative position was upheld only because he had intentionally omitted his membership in a gay rights group from his teaching application.

no excuse for the abridgement of first amendment freedoms. *Carey* v. *Population Services International*, 431 U.S. at 701; *Healy* v. *James*, 408 U.S. at 187-88; *see Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

That dismissal of a teacher for in-class advocacy of illegal conduct could be constitutionally justified under the *Pickering* balancing test and that such speech could lead to sanctions under section 6-103.15 does not make the statute constitutional. This statute, on its face, reaches far more than in-class advocacy of illegal acts to school children. No limiting construction can remove the statute's threat to constitutionally protected expression. *Broadrick* v. *Oklahoma*, 413 U.S. at 613. It regulates "only spoken words," *id.* at 612, and presents a "real and substantial" danger that protected speech may be muted. *Erznoznik* v. *City of Jacksonville*, 422 U.S. at 216; *see Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). It must therefore be struck down as unconstitutionally overbroad. *See Erznoznik* v. *City of Jacksonville*, 422 U.S. at 216-17; *cf. Members of the City Council* v. *Taxpayers For Vincent*, ——, U.S. ——, ——, 80 L.Ed.2d 772, 784 (1984); *Broadrick* v. *Oklahoma*, 413 U.S. at 612-13. Appellant's acknowledged discretion to control its schools cannot be exercised in such an unconstitutional manner. *See Board of Education* v. *Pico*, 457 U.S. at 871.

II.

Oklahoma retains statutory authority to terminate or refuse to employ teachers whose speech interferes with the proper functioning of the schools without relying on this unconstitutional statute.

As previously discussed, Oklahoma law allows, independently of section 6-103.15, for the dismissal of unfit teachers by specifically providing that they can be dismissed or refused reemployment "for immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude." Okla. Stat. tit. 70, § 6-103. It further provides that a teacher "shall be dismissed at anytime or not reemployed if convicted of a felony . . . ." *Id.* *See Childers* v. *Independent School District*, 645 P.2d 992 (Okla. 1981); *Winslett* v. *Independent School District No. 16*, 657 P.2d 1208 (Okla. App. 1982). Because the foregoing statute amply fulfills Oklahoma's interest in the proper functioning of its schools and teachers, it is clear that section 6-103.15, which singles out one topic of speech, is unnecessary to fulfill that interest.

Amicus is aware of no Oklahoma cases interpreting "immorality" or "moral turpitude" as those terms are used in section 6-103. Okla. Stat. tit. 70, § 6-103. Other states which similarly allow dismissal of teachers for "immorality"* require that the school district prove a connec-

* For example, N.Y. Educ. Law § 3020 provides:

> Except as otherwise provided . . . no teacher shall be removed during a term of employment unless for neglect of duty, incapacity to teach, immoral conduct, or other reason which, when appealed to the commissioner of education, shall be held by him sufficient cause for such dismissal.

tion between the conduct at issue and the teacher's performance of his or her classroom duties or the regular functioning of the schools. *See Shipley* v. *Salem School District*, 64 Or. App. 777, 669 P.2d 1172 (1983) (dismissal of a teacher for assault and battery of a sexual nature upon a twelve year old child who did not attend the teacher's school); *Jerry* v. *Board of Education*, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974) (dismissal for immoral conduct requires impairment of the teacher's professional responsibilities or capabilities); *Morrison* v. *State Board of Education*, 1 Cal.3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (revocation of teaching certificates for immoral and unprofessional conduct not authorized where the teacher had engaged in a homosexual relationship several years previously that had no effect on his teaching duties).

For example, an Illinois court applying a similar statute to an unwed, pregnant school teacher stated, "immorality . . . is sufficient cause [for dismissal] only where the record shows harm to pupils, faculty or the school itself. Otherwise, we would be subjecting teachers to infinitely variable definitions of morality and thereby interpreting the [Teacher Tenure] Act in a manner inconsistent with its purpose." *Reinhardt* v. *Board of Education*, 19 Ill. App. 3d 481, 311 N.E.2d 710 (1974), *vacated on other grounds*, 61 Ill. 2d 101, 329 N.E.2d 218 (1975). The court adopted the reasoning of an Ohio court in *Jarvella* v. *Willoughby-Eastlake City School District*, 12 Ohio Misc. 288, 233 N.E. 2d 143 (1967):

> The private conduct of a man, who is also a teacher, is proper concern to those who employ him only to the extent it mars him as a teacher. . . . Where his professional achievement is unaffected, where the school community is placed in no jeopardy, his private acts

are his own business and may not be the basis of discipline.

Id. at 146 (overturning a decision to terminate a high school teacher on the grounds of "immorality" for writing several letters containing "gross, vulgar and offensive language" to an eighteen year old student following his graduation).

Under section 6-103, Oklahoma would be able to dismiss a teacher if his or her advocacy of any illegal activity, such as sodomy, interfered with classroom conduct or the proper functioning of the schools. If the teacher advocated illegal acts during his or her class, and thereby neglected the school's chosen curriculum, a clear-cut case would be presented for finding interference, and the school board would be able to meet its burden of proof under section 6-103.9. *See Shurgin* v. *Ambach*, 83 A.D.2d 665, 442 N.Y.S.2d 212 (3rd Dept. 1981), *aff'd on other grounds*, 56 N.Y.2d 700, 436 N.E.2d 1324, 451 N.Y.S.2d 722 (1982) (upholding dismissal of a tenured high school teacher for knowingly exhibiting a pornographic film to high school students in a photography class).

If the advocacy of illegal conduct takes place outside of school, school officials may again look to whether the teacher's performance is affected. Under section 6-103, Oklahoma is no more barred from dismissing teachers who advocate disobedience of the criminal laws regarding sexual activity than regarding narcotics abuse. The test should be whether the conduct at issue has in fact impaired a particular teacher's performance of his or her responsibilities in the classroom and in the school generally. To accomplish this goal, there is no need additionally to proscribe advocacy of one form of illegal conduct, as Oklahoma has attempted to do with section 6-103.15.

This Court has stated, "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 538 (1980). Upholding the constitutionality of section 6-103.15 would allow Oklahoma to control not only the choice of subjects for debate but to exclude an entire class of public employees from that debate. This the first amendment does not allow.

Conclusion

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Tenth Circuit and hold that Okla. Stat. tit. 70, § 6-103.15 is unconstitutional on its face to the extent that it punishes teachers, student teachers and teacher's aides for pure speech.

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